

§ 137.429

Judge (ALJ), appointed under 5 U.S.C. 3105.

(b) Within 15 days of the date of the referral, the ALJ will hold a pre-hearing conference, by telephone or in person, to decide whether an evidentiary hearing is necessary, or whether it is possible to decide the appeal based on the written record. At the pre-hearing conference the ALJ will provide for:

- (1) A briefing and discovery schedule;
 - (2) A schedule for the exchange of information, including, but not limited to witness and exhibit lists, if an evidentiary hearing is to be held;
 - (3) The simplification or clarification of issues;
 - (4) The limitation of the number of expert witnesses, or avoidance of similar cumulative evidence, if an evidentiary hearing is to be held;
 - (5) The possibility of agreement disposing of all or any of the issues in dispute; and
 - (6) Such other matters as may aid in the disposition of the appeal.
- (c) The ALJ shall order a written record to be made of any conference results that are not reflected in a transcript.

§ 137.429 What happens when a hearing is necessary?

(a) The ALJ must hold a hearing within 90 days of the date of the order referring the appeal to the ALJ, unless the parties agree to have the hearing on a later date.

(b) At least 30 days before the hearing, the Secretary must file and serve the Indian Tribe with a response to the notice of appeal.

(c) If the hearing is held more than 50 miles from the Indian Tribe's office, the Secretary must arrange to pay transportation costs and per diem for incidental expenses to allow for adequate representation of the Indian Tribe.

(d) The hearing shall be conducted in accordance with the Administrative Procedure Act, 5 U.S.C. 556.

§ 137.430 What is the Secretary's burden of proof for appeals covered by § 137.415?

As required by section 518 of the Act [25 U.S.C. 458aaa-17], the Secretary must demonstrate by clear and con-

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vincing evidence the validity of the grounds for the decision made and that the decision is fully consistent with provisions and policies of the Act.

§ 137.431 What rights do Indian Tribes and the Secretary have during the appeal process?

Both the Indian Tribe and the Secretary have the same rights during the appeal process. These rights include the right to:

- (a) Be represented by legal counsel;
- (b) Have the parties provide witnesses who have knowledge of the relevant issues, including specific witnesses with that knowledge, who are requested by either party;
- (c) Cross-examine witnesses;
- (d) Introduce oral or documentary evidence, or both;
- (e) Require that oral testimony be under oath;
- (f) Receive a copy of the transcript of the hearing, and copies of all documentary evidence which is introduced at the hearing;
- (g) Compel the presence of witnesses, or the production of documents, or both, by subpoena at hearings or at depositions;
- (h) Take depositions, to request the production of documents, to serve interrogatories on other parties, and to request admissions; and
- (i) Any other procedural rights under the Administrative Procedure Act, 5 U.S.C. 556.

§ 137.432 What happens after the hearing?

(a) Within 30 days of the end of the formal hearing or any post-hearing briefing schedule established by the ALJ, the ALJ shall send all the parties a recommended decision, by certified mail, return receipt requested. The recommended decision must contain the ALJ's findings of fact and conclusions of law on all the issues. The recommended decision shall also state that the Indian Tribe has the right to object to the recommended decision.

(b) The recommended decision shall contain the following statement:

Within 30 days of the receipt of this recommended decision, you may file an objection to the recommended decision with the Secretary under 42 CFR 137.43. An appeal to